

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION at LEXINGTON**

C. MARTIN GASKELL,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 09-244-KSF
vs.	)	
	)	
UNIVERSITY OF KENTUCKY,	)	
	)	
Defendant.	)	

**PLAINTIFF’S PRETRIAL MEMORANDUM**

Pursuant to the Court’s Amended Scheduling Order [DE #17], Plaintiff C. Martin Gaskell, by and through undersigned counsel, respectfully submits the following Pretrial Memorandum:

**I. FACTS OF THE CASE**

In 2007, Gaskell applied for the position of Director of the MacAdam Student Observatory at the University of Kentucky. The expected duties of the Director, as well as the “other desirable qualities” noted by Department Chair, Michael Cavagnero, are detailed in the Court’s order and opinion [DE #47, at 4-5]. Gaskell’s extensive experience in observatory work, scientific research, teaching, and outreach are set forth in the materials he provided to UK at the time he applied for the position.

At the outset of the search process, Gaskell was the leading candidate for the position and, after the telephone interviews were conducted with each of the applicants, Gaskell was ranked first among seven, while Knauer was tied for third [DE #47, at 5 and 6].

During the process to fill the position, members of the search committee and Cavagnero, were made aware of Gaskell’s personal website, which included a document entitled, “Modern

Astronomy, the Bible, and Creation,” lecture notes used by Gaskell in making his presentation on this topic. Committee members were also given an assessment of Gaskell’s writings by Jeffrey Osborn, a biologist at UK, as well as the opinions of two other biology professors, James Krupa and Sheldon Steiner. Some committee members were also aware of a lecture Gaskell gave at UK in 1997 on the subject of science and religion, the topic of his “Modern Astronomy, the Bible, and Creation.”

Gaskell’s religious beliefs thus became a point of concern and discussion among the members of the search committee in deciding whom to hire for Observatory Director. As summarized by the Court in its Order and Opinion:

Cavagnero . . . stated that the debate generated by Gaskell’s website and his religious beliefs, was an “element” in the decision not to hire Gaskell. Also, Professor MacAdam testified in his deposition that Gaskell’s “views of religious things in relation to reconciling what is known scientifically about how the world developed and what is represented in the Bible” was “a factor” in his decision not to support Gaskell. Steve Ellis, a committee member, stated in his deposition that religion was an “underlying theme in everything we discussed.”

[DE #47 at 15.]

Sally Shafer, another committee member, pointed out that Gaskell was “potentially evangelical,” and noted that “[i]f the job were solely about physics and astronomy and within the university I would strongly agree with you that Martin’s beliefs on biology and religion don’t matter a hoot and should not figure in the discussion at all.” [*Id.*]

Finally, Tom Troland, the chair of the search committee, made the observation that “[w]e could easily choose another applicant, and we could content ourselves with the idea that Martin’s religious beliefs played little role in our decision. However, this is not the case. As it is, no objective observer could possibly believe that we excluded Martin on any basis other than religious. . . .” [*Id.* at 14.]

At no time did Gaskell ever suggest to anyone at UK, or anyone else for that matter, that he intended to use the position of Observatory Director as a way of publicly propounding his religion or his religious beliefs. During his face to face interview with Cavagnero, Gaskell assured him that he would abide by all university regulations pertaining to what he could say and do as Observatory Director.

The decision was ultimately made to hire Tim Knauer, and not Gaskell, for the position of Observatory Director.

## **II. QUESTIONS OF FACT**

The essential questions of fact in this case are as follows:

(1.) Was Martin Gaskell's "religion," 42 U.S.C. § 2000e(j), a motivating factor in UK's decision not to hire him for position of the Observatory Director?

(2.) Assuming Gaskell's religion was a motivating factor in the adverse employment action at issue, would UK have taken the same action in the absence of the impermissible motivating factor?

(3.) What amount of damages would adequately compensate Gaskell for economic losses (past and future) suffered as a result of Defendant's actions?

(4.) What amount of damages would adequately compensate Gaskell for non-economic losses suffered as a result of Defendant's actions?

## **III. QUESTIONS OF LAW**

The essential question of law in this case is as follows:

(1.) Was UK's consideration of Gaskell's religion as a motivating factor in its adverse employment action a violation of Title VII?

Under a mixed motive theory, the ultimate question of law is whether Gaskell can establish by a preponderance of the evidence that his religion was a motivating factor in the UK's decision not to hire him, even if other factors motivated UK's decision. *Barnes v. City of Cincinnati*, 401 F.3d 729, 740 (6<sup>th</sup> Cir. 2005); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 711-12 (6<sup>th</sup> Cir. 2006); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-5 (2003).

If the jury finds for Gaskell on this question, then Gaskell is entitled to damages unless Defendant proves by a preponderance of the evidence that it would not have hired Gaskell even if Gaskell's religion played no role in the decision. *Id.*

If UK is able to sustain its burden of proof on its affirmative defense, then plaintiff's remedies would be limited to an award of declaratory relief, injunctive relief, and attorney's fees. 42 U.S.C. § 2000e-5(g)(2)(B).

Conversely, with respect to damages, if (1) Gaskell is able to prove that his religion was a motivating factor in UK's decision not to hire him and (2) UK does not sustain its burden, plaintiff is entitled to compensatory damages under 42 U.S.C. § 1981a and, in addition, equitable relief, including back pay and front pay, with the overarching goal of making plaintiff whole. *See Shore v. Federal Express Corp.*, 42 F.3d 373, 377 (6<sup>th</sup> Cir. 1994) ("Upon a finding of invidious discrimination in violation of Title VII, a district court has 'wide discretion' with regard to imposing equitable remedies so as 'to fashion the most complete relief possible' designed to 'make the victims of unlawful discrimination whole'" (citation omitted); 42 U.S.C. § 2000e-5(g)(1); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

#### **IV. EXPECTED EVIDENTIARY OBJECTIONS**

Other than plaintiff's motion *in limine*, filed separately with the Court, plaintiff does not anticipate any evidentiary objections. Troland's emails, which the Court held to constitute direct

evidence of discrimination, have also been held by the court to be admissible [DE # 47, at 14-15.] The Court's decision on the admissibility of Troland's emails, which is now the law of the case, supports the admissibility of all emails produced in discovery.

**V. PENDING MOTIONS**

There are no pending motions at this time.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2010, I electronically filed the foregoing Plaintiff's Pretrial Memorandum with the Clerk of Court using the CM/ECF filing system, which will send notification of such filing to the following:

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